Supreme Court, U.S.
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No. 02-1371

In the
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

v.

PATRICE SEIBERT,
Respondent.

Petition for a Writ of Certiorari
to the Supreme Court of Missouri

# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent seeks to lessen the importance of the question presented in this case in three ways. But even her own authority demonstrates that law enforcement officers are being trained to do precisely what the officer here did, and there remains a divide among the courts with regard to the legality of that technique under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Oregon v. Elstad*, 470 U.S. 298 (1985).

Since the Petition was filed, the Court has granted certiorari in two cases that present questions related to, though distinguishable from, the one stated here: *Fellers v. United States*, No. 02-6320, and *United States v. Patane*, No. 02-1183. Though the Court could choose to hold this case pending decisions in those cases, the better course would be to grant this petition and consider the three cases side-by-side.

1. Respondent begins by arguing that "[p]etitioner has presented no concrete evidence to suggest that this type of training [where an officer questions suspects "outside *Miranda*"] is widespread." Brief in Opposition to Certiorari ("Cert. Opp.") at 6. Respondent then points to a document, the Federal Bureau of Investigation's August 2001 Law Enforcement Bulletin (http://www.fbi.gov/publications/leb/2001/august2001/aug01p27.htm) ("Bulletin"), that actually fills the gap she incorrectly says petitioner left. She quotes, out of context, a single statement: "Departments must ensure that their officers do not interrogate 'outside Miranda,' and immediately abandon any condoned practice or policy of intentional violations of *Miranda*." *Id.* at 29, *see* Cert. Opp. at 6. But immediately before that sentence, the article confirms that officers are being trained to use the very techniques at issue here:

> These permissible uses of incriminating statements obtained in violation of *Miranda* have led to a practice in law enforcement of intentionally questioning in violation of *Miranda*. This practice is commonly referred to as questioning "outside *Miranda*." In fact, *numerous law enforcement agencies have encouraged and provided training in this practice* . . . .

Bulletin at 29 (emphasis added).

Respondent then points out that "very few *Miranda* cases decided in the nearly two decades since *Oregon v. Elstad*, involve the deliberate refusal to give warnings once the custodial interrogation has commenced." Cert. Opp. at 6. Her apparent premise is that any time a court did not discuss in a particular case whether the failure to warn was deliberate, then it must have been inadvertent. That premise might make sense when looking at future decisions in Missouri and other jurisdictions where intent is now relevant. But it makes no sense cast backwards. In *Elstad* this Court declined to attach any importance to the reason the officer failed to advise the suspect of his rights. Instead, the Court turned to the objective facts surrounding the questioning and concluded that the "incident had none of the earmarks of coercion." *Elstad*, 470 U.S. at 315-316. That so few courts have noted the intent of the officer merely highlights the alteration in the *Elstad* analysis that the Missouri court made.

Respondent does not directly dispute the negative impact that the divide among courts regarding subjective intent has on the concreteness of *Miranda*. Instead she minimizes that impact by asserting that law enforcement officers tend to follow this Court's decisions. Cert. Opp. at 6-7. We do not suggest otherwise. But as respondent



points out in her very next paragraph, law enforcement has a "tendency to 'grow in constitutional as well as technological sophistication.'" Cert. Opp. at 7. And that "sophistication" will include an understanding of the practical limitations on a rule that depends entirely on subjective intent.

Contrary to respondent's implication (Cert. Opp at 6-7), the addition of *Dickerson v. United States*, 530 U.S. 428 (2000), to the body of *Miranda* law does not significantly affect that result. Again, the Court in *Dickerson* expressly affirmed the continuing validity of *Oregon v. Elstad*. 530 U.S. at 441. The acknowledged sophistication of law enforcement will undoubtedly lead officers – at least in some jurisdictions – to continue to use techniques that approximate what occurred in *Elstad*. And those techniques will include or parallel the one whose legality is the subject of the debate that the Missouri Supreme Court entered here.

2. Respondent errs when she belittles the existence of that debate, claiming that there is no "clear legal disagreement between the federal courts of appeals or state supreme courts." Cert. Opp. at 1-2, 8-10. There is certainly a disagreement. And any lack of clarity is due to her obfuscation.

Respondent argues that the courts identified in the petition have merely reached different results because the cases before them were "factually distinct." Cert. Opp. at 8. But this is overly simplistic; there are always factual differences among cases. The truth remains that courts are applying opposing rules of law to the facts before them.

The divide is starkly portrayed by applying the First Circuit's holding in *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000), to the facts here. The First Circuit expressly rejected the addition of an "intent" test in applying *Elstad*: "The addition of a subjective intent by the officer to violate *Miranda*, unaccompanied by any coercive conduct, cannot in itself undermine the suspect's free will." 208 F.3d at 321. Thus, the First Circuit would never reach the question of the officer's subjective intent. But the Missouri court found intent to be dispositive: "In light of the record in this case, this Court presumes the [intentional] violation of *Miranda* was a tactic to elicit a confession and was used to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." Petition Appendix at A9. The very same fact – the deliberate withholding of the *Miranda* warning – obtained a favorable result for Seibert but did nothing for Esquilin.

The divide cannot be papered over by a claim that the Missouri Supreme Court or any other court "simply applied the straight-forward voluntariness test found in *Elstad*." Cert. Opp. at 9. Indeed, that argument misses the point. *Elstad* calls for a determination of the voluntariness of a post-*Miranda* statement. But the question here is a different one: whether a pre-*Miranda* confession, regardless of whether it was voluntary, "taints" a second, post-*Miranda* confession if the failure to warn was deliberate. In *Elstad*, this Court held that, unless there is actual coercion, a pre-*Miranda* confession does not "taint" a post-*Miranda* confession. We do not know where a "straightforward" application of *Elstad* would lead the Missouri court, for in that court's view, the officer's "subjective intent" eliminates the need for a finding as to coercion.



Respondent's claim that the First and Ninth Circuits, too, merely followed *Elstad* (Cert. Opp. at 9-10) either misconstrues the meaning, or misinterprets the significance, of the decisions in *Esquilin* and *United States v. Orso*, 266 F.3d 1030 (9th Cir. en banc 2001). Neither court held "that the deliberate failure to Mirandize a defendant renders post-*Miranda* statements involuntary." Cert. Opp. at 10. And it is precisely at that point that the path taken by the Ninth and First Circuits and the one followed by the Missouri Supreme Court and others diverge. Subjective intent – the "deliberate[ness of the] failure" – defines one path but is irrelevant along the other.

Respondent argues that the "intentional refusal to advise respondent of her rights at the beginning of the interrogation process constituted but one" circumstance that the Missouri Supreme Court considered in determining that her post-*Miranda* confession was involuntary. Cert. Opp. at 10. But again, respondent misses the point. Subjective intent was not a factor to be considered in *Elstad*. And it is still not a factor in some jurisdictions. This petition asks whether the Constitution makes it a factor.

3. Lastly, despite the fact that there is not a single reference to *Westover v. United States*, 384 U.S. 436 (1966), in the Missouri court's opinion, respondent declares that "the decision below faithfully applies this Court's decision in *Westover*." Cert. Opp. at 2. In her view, applying *Westover* would make the debate over intent irrelevant. *See* Cert. Op. at 11. And indeed the debate would have been irrelevant, had the Missouri court followed that path. But it chose another course, never finding the coercion that is at the heart of *Westover*.

Westover was interrogated by police officers over the course of about fourteen hours, without ever being advised of his rights. *Miranda v. Arizona*, 384 U.S. at 494-495. Then he was turned over to FBI agents who continued to interrogate him without "an articulated waiver of rights." *Id.* Accordingly, despite some evidence of warnings, this Court concluded that it could not assume that Westover had intelligently waived his constitutional rights. *Id.* Thus *Westover* involved a "prior statement" that was "actually coerced." *See Oregon v. Elstad*, 470 U.S. at 310; *Miranda v. Arizona*, 384 U.S. at 496-497 (confession was the result of "pressure" applied by local police officers in "compelling surroundings").

Respondent correctly notes that "[t]he Missouri Supreme Court never found that respondent's first statement was voluntary" (Cert. Opp. at 11), the critical question under *Westover* and *Elstad*. No one here disputes that *Westover* would apply if the Missouri court had concluded that the first, pre-*Miranda* confession was actually coerced. The key to understanding this case is to recognize the significance of the Missouri court's failure to determine whether respondent's first statement was coerced.

The contrast between the facts here and those in *Westover* highlight the difficulty that the Missouri court would have faced in finding actual coercion. Seibert was arrested at the hospital (where she was with her son), transported to the police station, questioned for about forty minutes, given a fifteen- to twenty-minute break, and then carefully advised of her *Miranda* rights. Petition App. at A3. The initial questioning was conducted in low, conversational tones, without any threats of any



kind. Petition App. at A3, A16-A17, A21-A26. Seibert's pre-*Miranda* confession was not, "when judged side-by-side with the facts in *Westover*, clearly involuntary." Cert. Opp. at 11. Facing a more difficult set of facts, the Missouri court chose to avoid deciding whether there was actual coercion, instead preempting the *Elstad* analysis by inquiring into intent.

4. On the very day this petition was filed, the Court granted the petition in another *Miranda* case, *Fellers v. United States*, No. 02-6320. *Fellers* poses a question closely related to the one posed here, but the differences merit separate consideration.

Fellers was questioned after indictment, without being given his *Miranda* warnings. The first question he presents is whether the pre-warning, post-indictment interrogation violated his Sixth Amendment right to counsel. *See* Petition for Writ of Certiorari, No. 02-6320, at i; Brief of the United States in Opposition, No. 02-6320, at I. The Eighth Circuit held that it did not because Fellers was not "interrogated." *United States v. Fellers*, 285 F.3d 721, 724 (8th Cir. 2002). The second question is whether that alleged Sixth Amendment violation impermissibly taints later, post-warning, voluntary statements. Petition, No. 02-6320 at i; Cert. Opp., No. 02-6320, at I; *see* 285 F. 3d at 724.

Like Fellers, Seibert was questioned in two steps. But unlike Fellers, Seibert has not asserted a violation of her Sixth Amendment right to counsel. Nor could she; at the time of the initial questioning, she had not been indicted, nor had criminal proceedings otherwise been initiated against her.

A holding that Fellers' Sixth Amendment rights were violated would not dispose of any issue in this case. Nor would a decision that the exclusionary "fruits" doctrine applies after a Sixth Amendment violation. This Court has rejected the premise that a violation of every *Miranda*-related constitutional right "breed[s] the same irremediable consequences." *Oregon v. Elstad*, 470 U.S. at 309. *See Dickerson v. United States*, 530 U.S. at 441 ("refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases . . . recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."). To apply to the Fifth Amendment context of this case the holdings that Fellers seeks in his Sixth Amendment case would require additional analytical steps – steps that merit independent consideration by the Court.

Recently, the Court granted the petition in another *Miranda* case, *United States v. Patane*, No. 02-1183. The Tenth Circuit's analysis in *Patane* began with a broader question – one relevant here: the extent to which *Elstad* survived *Dickerson*. *United States v. Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002). But the question on which certiorari was granted goes to the Tenth Circuit's later conclusion that even in *Elstad*, this Court had permitted a distinction between subsequent statements and physical evidence. 71 U.S.L.W. 3555 (Feb. 25, 2003). *See* 304 F.3d at 1021.

Again, here we ask whether the holding of *Elstad* permitting use of a statement made after an unwarned statement applies regardless of the subjective intent of the officer doing the questioning. The United States asks in *Patane* whether *Elstad* applies to physical evidence to



which the unwarned statement leads. The answer to one question will not provide an answer to the other.

## CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the Petition and resolve the dispute among the courts as to whether subjective intent should be added to the *Elstad* analysis.

Respectfully submitted,

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